Journal of Collective Bargaining in the Academy

Volume 0 *National Center Proceedings 2016* Article 64

September 2016

Panel: Discrimination and Harassment Issues in Higher Education - Recent Tenure Discrimination Federal Court Decisions

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Recent Tenure Discrimination Federal Court Decisions [1]

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Yul Chu v. Mississippi State University, 592 F. App'x 260 (5th Cir. 2014)

Plaintiff, an Asian male (native of South Korea) was denied tenure at a state university and brought suit claiming racial discrimination. The Fifth Circuit noted:

> University tenure decisions represent a distinct kind of employment action, involving special considerations. In order to establish a prima facie case in the context of a denial of tenure, the plaintiff must show that: (1) he belongs to a protected group, (2) he was qualified for tenure, and (3) he was denied tenure in circumstances permitting an inference of discrimination. Evidence that supports a prima facie case includes departures from university procedures, conventional evidence of bias against he plaintiff, and evidence that the plaintiff is found to be qualified for tenure by some significant portion of the department faculty, reference, or other scholars in the particular field. Id. at 265.

The plaintiff proffered as direct evidence testimony that members of his department mocked his accent at different times. The Fifth Circuit ruled that the standard for workplace comments in order to amount to "direct evidence" of discrimination, the comments "… must be (1) related to the plaintiff's protected status; (2) proximate in time to the adverse employment action; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue." Id. at 264; see Brown v. CSC Logic, Inc., 82 F.3d 651, 655 (5th Cir. 1996).

Here, the comments were made in 2002-2003 and so the court concluded that since the plaintiff did not apply for tenure until 2006, the court concluded, "that such temporal distance attenuates the connection between the actions and the tenure decision." 592 F. App'x at 264. Further, the court dismissed the comments as direct evidence of discrimination as the comments were not made by "individuals with authority over the tenure decision. Though it is true that members of his department sat on one committee that made a recommendation on tenure, the tenure-approval process consisted of multiple levels of review and avenues for appeal. The faculty members alleged to have made these comments did not make the final decision as to plaintiff's tenure, and any influence over the decision was limited by the committee and review structures. Finally, the alleged jokes and comments about his accent were not related to the tenure decision at issue, so they are not direct evidence of discrimination." Id.

The Fifth Circuit found: "At every level, those who reviewed plaintiff's application recommended against granting tenure, finding that he had failed to complete sufficient

[1] Professor Rossein acknowledges the research assistance of Alexis Werth, 3 L CUNY School of Law.

research as a professor. In reaching that conclusion, the decision makers looked a number of factors relating to research, including the number of articles plaintiff published, the quality and prestige of the publishing journals, and the amount of outside research funding he secured." Id. at 265 Plaintiff failed to publish any articles during his first five ears at MSU. When he applied to for tenure, he had published only three, with several others accepted for publication, but the publishing journals were not highly regarded. Finally, plaintiff had secured only $26,000 in research funding, which was far below average for his department. Moreover, those deficiencies in plaintiff's research were pointed out in his annual performance reviews. Based on this and other evidence, the tenure reviewers determined that plaintiff did not meet the research requirements for tenure and did not excel in any of the three (aforementioned) relevant areas. Id.

Thrash v. Miami University, 549 F. App'x 511 (6th Cir. 2014) cert. denied, 135 S. Ct. 245, 190 L. Ed. 2d 136 (2014).

In 2004, a search committee conducted a search to fill a single, open tenure-track position in the University's Department of Paper Science and Engineering (the Department). The committee's list of finalists for the position included Dr. Thrash and Dr. Lei Kerr. The committee recommended Dr. Kerr as its first choice, while also recommending that the University bring Dr. Thrash into the Department as a tenure-track "opportunity hire." According to Dr. Marek Dollar, Dean of the School of Engineering and Applied Sciences, an "opportunity hire" was a hire made pursuant to an "informal policy" at the University of obtaining funding to hire candidates who were under-represented minorities even if the University did not have a position open. Id. at 513.

When a tenure-track instructor is hired, he or she is placed on a multi-year "probationary period" during which time he or she is evaluated yearly using the four tenure criteria. Each year, the department-level promotion and tenure (P & T) committee, the department chair, and the division dean evaluate the candidate. In this case, the department-level P & T committee consisted of three tenured faculty members from the Department, and did not include Dr. Lalvani. Id. Dr. Thrash's first four-year reviews noted that he was deficient in the area of research. Dr. Thrash's fourth-year reviews were more direct. The department-level P & T committee found that, although Dr. Thrash excelled at teaching, [t]he P & T guidelines require that you establish a record of high-quality publications at Miami. In the judgment of the committee this has not been done yet .... Your final dossier should demonstrate growth in scholarship over your first five years at Miami to show that you have established a record of high- quality publications and a viable research program. Dr. Thrash's fifth-year reviews were more positive. The department-level P & T committee, Dr. Lalvani, and Dean Dollar all noted that in the previous year, Dr. Thrash had three papers accepted for publication in peer-reviewed journals. However, the committee also continued to "recommend[ ] that you further strengthen your research agenda in your [P & T] dossier." Similarly, Dean Dollar's fifth-year review praised Dr. Thrash's improvements in securing publications, but stressed "the need to demonstrate prospective continuation of his research in the years to come." Provost Herbst commended Dr. Thrash on his increased publications, but added that it was still "essential that you indicate the nature of your contribution on multi-authored publications." Id. at 514-15.

The court goes through the burden shifting framework language and noted that defendants proffered a legitimate, nondiscriminatory reason for the decision to not extend a tenure offer to Dr. Thrash, namely, that his scholarship and research record was insufficient to warrant tenure. Id. at 518.

Thrash argued that the decision not to offer him tenure was pretextual because there is evidence that Dr. Lalvani (superior) "devalued African-American scholars generally." The court declines to agree with argument citing to the record that he was in fact hired by the department as a viable candidate, indicating he was qualified, and Dr. Lalvani "enthusiastically recommended that Dr. Thrash be hired." The court said that it could not conclude "merely from the fact that Dr. Thrash was hired as an opportunity hire that Dr. Lalvani harbored a negative view of either African-American scholarship or Dr. Thrash." Id. at 519.

Plaintiff further argued as an example of pretext, that the fact the department rejected some of his outside references from historically Black colleges are indicative of discrimination. But the court concluded that four of the six reviewers who were selected for the final review of his application were African-American , including three suggested by Thrash and therefore this argument was weak. Id. at 519.

Finally, the court addressed plaintiff's pretextual argument that he was qualified for tenure. The court specifically notes that it approached this argument "cautiously as it is not the function of the courts to sit as super-tenure committees." Id. at 521. Further, the Sixth Circuit noted:

> To the extent that, as here, a plaintiff's pretext argument would require courts to perform a substantive evaluation of his or her own academic record, the courts face a significant challenge. We are neither engineers nor scientists, and as such are ill-suited to evaluate the quality of Dr. Thrash's work ourselves. To that end, this court has previously noted that "tenure decision sin an academic setting involve a combination of factors which tend to set them apart from employment decisions generally." Id. at 521.

The Court relies on the Seventh Circuit's policy language for guidance:

> Tenure cases require something more than mere qualification; the department must believe the candidate has a certain amount of promise…Given the nuanced nature of such decisions, we generally do not second guess the expert decisions of faculty committees…Accordingly, in the absence of clear discrimination, we are generally reluctant to review the merits of tenure decisions, recognizing that scholars are in the best position make the highly subjective judgments related to the review of scholarship and university service."Id. citing Adelman-Reyes v. Saint Xavier Univ., 500 F.3d 662, 667 (7th Cir. 2007).

The court also relies on similar Eighth Circuit language, "in the tenure context…the plaintiff's evidence of pretext must be of such strength and quality as to permit a reasonable finding that the denial of tenure was obviously unsupported." Thrash at 521; Kobrin v. Univ. of Minnesota, 121 F.3d 408, 414 (8th Cir. 1997).

The court took into account plaintiff's five plus years academic achievements while at the institution and concluded that while plaintiff performed well in his fifth year by receiving high marks in teaching and in service, his research (skill) was still questioned by the committee. Thrash at 521. Further, the court used the University's tenure guideline, that it looks not simply at current skill and research acumen but also "prospective continuation of high quality" scholarship, that plaintiff did not meet those requirements according to this reviews. Id. at 522. Further, the court notes that in plaintiff's chosen outside reviewers, many of them expressed mixed views about the quality of his scholarship and that therefore, taking all of the circumstances and facts into consideration, "Dr. Thrash's evidence of pretext as to the quality of his scholarship was not of such a strength and quality as to permit a reasonable finding that the denial of tenure was obviously unsupported.'" Id.; see Kobrin, 121 F.3d at 414.

The court then reviews plaintiff's arguments of discrimination via his supervisor, Dr. Lalvani. The court utilizes the "cat's paw" theory of liability in its decision. Thrash at 522. "The cat's paw theory of liability, refers to a situation in which a biased subordinate, who lacks decision making power, uses the formal decision maker as a dupe in a deliberate scheme to trigger a discriminatory action." Thrash at 522; E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476, 484 (10th Cir. 2006), accord Davis v. Omni-Care, Inc., 482 F. App'x 102, 109 (6th Cir. 2012). "In cases where intermediate supervisors harbor an impermissible bias, it is proper to impute their discriminatory attitudes to the formal decision maker even if the formal decision maker did not harbor such attitudes." Thrash at 522; Bryant v. Compass Grp. USA Inc., 413 F.3d 471, 477 (5th Cir. 2005).

"If a supervisor performs an act motivated by animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." Thrash at 522; Staub v. Proctor Hosp., ___U.S. ___, 131 S.Ct. 1186, 1194 (2011). "With regard to causation, the Court held that it is common for injuries to have multiple proximate causes, and, therefore, the mere fact that a decision maker conducts a post hoc investigation into its decision does not per se absolve it of liability, particularly if the investigation relies on facts provided by the biased supervisor." Thrash at 522; Staub at 1192-93.

Here, the plaintiff argued that because at every stage of his tenure review, Dr. Lalvani's negative tenure recommendations were relied on "to some degree," that under Staub, he is entitled to relief. However, the court makes very clear that in order to prevail under a cat's paw theory, Thrash would have had to demonstrate that Dr. Lalvani's actions or negative comments were both a proximate cause and the ultimate cause of the ultimate decision to deny him tenure. Thrash, at 523. The court concludes that even if Thrash could

show that Dr. Lalvani's negative comments were a proximate cause of his tenure denial, the plaintiff failed to show that Dr. Lalvani's actions were in fact pretextual. Id.

Finally, the court concludes that it would be improper to "impute Dr. Lalvani's alleged discriminatory attitude to the University where Dr. Thrash has failed to create a fact question regarding Dr. Lalvani's discriminatory attitude in the first place. Id.

The court ruled that plaintiff failed to prove that he was a victim of intentional discrimination when he was denied tenure. Id.

Blasdel v. Nw. Univ., 687 F.3d 813 (7th Cir. 2012)

Judge Posner for the Seventh Circuit emphasized the great difficulty in challenging tenure denial noting:

> But although the legal standard is the same whether the plaintiff in an employment discrimination case is a salesman or a scientist, practical considerations make a challenge to the denial of tenure at the college or university level an uphill fight—notably the absence of fixed, objective criteria for tenure at that level. *Vanasco v. National–Louis University,* 137 F.3d 962, 968 (7th Cir.1998) ("such decisions necessarily rely on subjective judgments about academic potential"); *Namenwirth v. Board of Regents of University of Wisconsin System,* 769 F.2d 1235, 1243 (7th Cir.1985) ("tenure decisions have always relied primarily on judgments about academic potential, and there is no algorithm for producing those judgments"); *Fisher v. *816 Vassar College,* 70 F.3d 1420, 1435 (2d Cir.1995) ("it is difficult to conceive of tenure standards that would be objective and quantifiable"), abrogated on other grounds, *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 147–48, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *Zahorik v. Cornell University,* 729 F.2d 85, 92–93 (2d Cir.1984) ("the particular needs of the department for specialties, the number of tenure positions available, and the desired mix of well known scholars and up-and-coming faculty all must be taken into account.... [T]enure decisions are a source of unusually great disagreement.... [T]he stakes are high, the number of relevant variables is great and there is no common unit of measure by which to judge scholarship").

Id. at 815-16.

Further, Judge Posner opined about institutional autonomy and academic freedom as a caution to courts addressing discrimination claims in tenure cases, stating:

> And we must not ignore the interest of colleges and universities in institutional autonomy. *Grutter v. Bollinger,* 539 U.S. 306, 328–30, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *Regents of University of Michigan v. Ewing,* 474 U.S. 214, 225, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985); *Hosty v. Carter,* 412 F.3d

> 731, 736 (7th Cir.2005) (en banc) ("academic freedom includes the authority of the university to manage an academic community and evaluate teaching and scholarship free from interference by other units of government, including the courts"); *Piarowski v. Illinois Community College District 515,* 759 F.2d 625, 629–30 (7th Cir.1985); *Urofsky v. Gilmore,* 216 F.3d 401, 412–15 (4th Cir.2000) (en banc). Although the Supreme Court in *University of Pennsylvania v. EEOC, supra,* 493 U.S. at 195–201, 110 S.Ct. 577, was emphatic that academic freedom does not justify immunizing materials submitted in the tenure process from the EEOC's subpoena power, courts tread cautiously when asked to intervene in the tenure determination itself. They must be mindful that, as Judge Friendly said in *Lieberman v. Gant,* 630 F.2d 60, 67 (2d Cir.1980), "to infer discrimination from a comparison among candidates is to risk a serious infringement of first amendment values. A university's prerogative 'to determine for itself on academic grounds who may teach' is an important part of our long tradition of academic freedom. *Sweezy v. New Hampshire,* 354 U.S. 234, 263, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., joined by Harlan, J., concurring in the result) (citations omitted)."

Id. at 816.

Judge Posner also explored quantity and quality issues and the fact that tenured faculty makes it extremely difficult to terminated a professor, noting:

> A disappointed candidate for tenure at a college or university may well be the best possible candidate along one dimension but not others. If *A* publishes an excellent academic paper every five years on average, is she better or worse than *B,* who publishes a good but not excellent paper on average every six months, so that at the end of five years he has published 10 papers and she only 1? Quantity and quality are (within limits) substitutes. A company that made the finest automobile in the world, but made only one a year, would not be the world's best automobile manufacturer. Or suppose Professor *C* used to publish a paper every six months, but she has slowed down, while *D*, who is younger, has not. That is an ominous sign from the standpoint of granting *C* tenure, because a tenured professor is very hard to fire even if he or she has ceased to be a productive scholar. With mandatory retirement now unlawful, the grant of tenure is often literally a lifetime commitment by the employing institution, barring dementia or serious misconduct.

Id.

Judge Posner also pointed out that both obtaining grants in some fields and office politics adds further complications to examining tenure denials, stating:

> In some academic fields, moreover—including as it happens physiology—research requires costly laboratories financed by grants from the federal

> government or from foundations. Proficiency in obtaining grants is a highly valued capability in such fields; and scholars differ in their ability to obtain grants. Then too, office politics frequently plays a role in the award or denial of tenure; friendships and enmities, envy and rivalry—the stuff of such academic novels as *Publish and Perish: Three Tales of Tenure and Terror,* by James Hynes, or Randall Jarrell's *Pictures from an Institution*—can figure in tenure recommendations by the candidate's colleagues, along with disagreements on what are the most promising areas of research. In addition, many academics are hypersensitive to criticism, especially by younger academics, whom they suspect, often rightly, of wanting to supplant them. Although office politics and professional jealousy are bad reasons for denying tenure, an erroneous denial of tenure, as such, does not violate Title VII.

Id. at 816-17.

Judge Posner found an analogy in the decision to appoint a federal judge in tenure decisions, noting:

The decisionmaking process in an academic hierarchy creates further complication. Granting tenure, like appointing a federal judge, is a big commitment. The final decision may be made by a committee, or an official such as a university provost or president, remote from the chairman and the other members of a candidate's department. Even if invidious considerations play a role in the department's recommendation for or against tenure, they may play no role in the actual tenure decision, made at a higher level. In the present case the tenure decision was made by Northwestern's provost, and there is no evidence that he was influenced by the fact that Blasdel is a woman. So she can prevail only by showing that the provost's decision was decisively influenced by someone who *was* prejudiced. *Sun v. Board of Trustees of University of Illinois,* 473 F.3d 799, 812–13 (7th Cir.2007); *Qamhiyah v. Iowa State University of Science & Technology,* 566 F.3d 733, 745–46 (8th Cir.2009); cf. *Schandelmeier–Bartels v. Chicago Park District,* 634 F.3d 372, 378–79, 383–84 (7th Cir.2011); *Adelman–Reyes v. Saint Xavier University,* 500 F.3d 662, 667 (7th Cir.2007).

Id. at 817

Lastly, Judge Posner warned against using statistical inferences in tenure denial cases because:

And finally, because so many factors influence the tenure process and because statistical inferences of discrimination are difficult to draw when there is only a small number of observations (tenure appointments in a particular department may be few and far between), it can be difficult to infer the presence of an invidious influence such as the sex of the candidate merely by comparing successful and unsuccessful tenure applicants.

Id.

Barron v. Univ. of Notre Dame Du Lac, 93 F. Supp. 3d 906, 908-10 (N.D. Ind. 2015)

Plaintiff alleges that when she was denied tenure in May 2009 she suffered an adverse employment action caused by invidious gender discrimination, and argued that she can succeed under either the direct or indirect method of proof. Defendant asserted that Plaintiff never suffered an adverse employment action because Defendant granted her tenure after her successful internal university appeal. The court denied in part the defendant's motion for summary judgment.

Plaintiff is a woman who holds a Ph.D. in mathematics who was denied promotion to Associate Professor and tenure in 2009. The Dean of the College of Science (which includes the Math Department), sent Plaintiff a written explanation of the negative decision stating that the Provost's Advisory Committee ("PAC") had recommended against awarding tenure because the "quality of [Plaintiff's] teaching did not meet the standard of excellence expected of [tenure candidates]." Plaintiff pursued two, parallel, internal appeals of the tenure denial. One avenue focused on whether the denial of tenure was substantially affected by procedural error, personal bias, or academic freedom issues. The Committee on Appeals determined that there was not enough evidence showing that the decision to deny tenure was affected by one of these subjective factors. The second route is called the "Appendix A" appeals process and applies to reviewing adverse promotion or tenure decisions that are allegedly the product of sex discrimination.

Plaintiff conducted an independent study of teaching evaluations in the Math Department. She discovered that among assistant professors, the female professors were assigned introductory-level courses at a markedly higher percentage of their total number of courses taught, as compared to the male professors. Plaintiff used this evidence to show Defendant's perception of her teaching qualities was a result of gender discrimination. Plaintiff had a history of receiving low TCE scores from students in introductory level courses. She claimed that these lower evaluations resulted from the disproportional assignment of introductory-level mathematics courses. Instructors in those courses notoriously receive lower student evaluations because many of the students in those classes are not math majors. She argued that the disproportionate assignment of these low-level courses was the result of gender bias, and therefore, she was denied tenure because of her sex. Plaintiff compiled statistical data to support these claims, and supplied the data to the Committee on Advancement and Promotions.

Among the assistant professors in the Math Department eligible for tenure, from 1999–2009, Defendant granted tenure to eight males and one female. The sole female, Professor Polini taught six courses, and three of the males, Professors Hind, Misiolek, and Diller, taught fifteen courses before tenure; Plaintiff taught sixteen courses. However, eleven of Plaintiff's sixteen courses were 100–level introductory courses, while Hind and Misiolek each taught five 100–level courses, and Diller taught one 100–level course.

Pursuant to Appendix A of the Defendant's *Academic Articles,* Plaintiff selected a tenured faculty member from an appointed panel to review her case, and this reviewer decided that the President's decision to deny tenure should be remanded to the PAC to be reconsidered.

This remand began in January 2010, but started in the Department of Mathematics Committee on Advancement and Promotion instead of the PAC.

On February 18, 2010, Plaintiff completed an EEOC intake questionnaire and indicated that she wanted to initiate a charge of sex discrimination against Defendant. Plaintiff submitted a charge of sex discrimination and retaliation to the Indiana Civil Rights Commission on April 1, 2010.

The 2009–10 school year ended in May 2010. On June 9, 2010, Provost Thomas Burish sent Plaintiff a letter indicating that her Appendix A appeal was successful and President Rev. Jenkins offered Plaintiff promotion and tenure. Plaintiff accepted the offer for tenure on June 14, but also asked for a grant of paid leave in order to teach at Max Planck Institute in Germany. Defendant granted Plaintiff a year-long leave of absence, but the leave was unpaid because she had not accumulated the Department of Mathematics minimum six years of service since her last paid leave. She returned to her position with Defendant.

The court first noted that the reversal of the tenure denial on appeal did not rise to a level of direct evidence of sex discrimination. It then proceeded to analyze the case under the McDonald Douglas paradigm. Whether plaintiff demonstrated an adverse action was at issue. The court ruled that the "initial denial of tenure in this case constitutes adverse employment action, despite the subsequent grant of tenure, because the initial denial caused Plaintiff to materially suffer." Although she secured another position for the following year while the internal appeals process began reconsidering her tenure candidacy in January 2010, she was granted a leave of absence without pay that she would not have requested had she not been denied tenure in May 2009. Plaintiff sought, among other damages, the difference between the salary she would have made as an Associate Professor of Mathematics with tenure and the stipend she actually received from the Max Planck Institute for Mathematics for the 2010–11 school year. The court ruled that this loss of earnings is more than *de minimis* and constitutes a materially adverse effect of the initial denial. Id. at 914.

For the fourth prong of the *McDonnell Douglas* test, Plaintiff presented evidence that similarly situated male professors were granted tenure where she was initially denied, notably Professors Hind, Misiolek, and Diller. Defendant did not dispute that these men received tenure, but argued that because another female, Professor Polini, also received tenure there should not be any inference of gender discrimination. Defendant also asserted that Plaintiff has failed to demonstrate that the men who were promoted are appropriate comparators.

The court noted that an appropriate comparator is a "similarly situated" person who was treated more favorably. The court relied on Sun v. Bd. of Trs. of Univ. of Ill., 473 F.3d 799, 814 (7th Cir.2007) where the Seventh Circuit considered another tenure candidate as "similarly situated" to Sun because he was in the same department as Sun, he was outside the protected class, and was considered for tenure the year before Sun. Therefore, the court here found it appropriate to view several of the men identified by Plaintiff as similarly

situated to her if they had the same rank as her in the Math Department and were eligible for tenure within a reasonable time of her initial denial in May 2009.

The court found that at least one of the male professors promoted and given tenure was comparable to Plaintiff. Professor Hind, in particular, satisfied these requirements. Professor Hind was a male, Defendant gave Professor Hind tenure in 2007, and prior to receiving tenure he was an assistant professor in the Math Department. Prof. Hind was more appropriate than some other males because he taught almost the same number of courses as Plaintiff before the tenure decision. Thus, the Court was satisfied that Professor Hind was an appropriate comparator.

The court found that the Plaintiff carried her burden of demonstrating the *prima facie* case, and that the Defendant's met its legitimate, non-discriminatory reason for the action, that the quality of her teaching "did not meet the standard of excellence" expected of tenure candidates. However, the court ruled that the evidence supporting Plaintiff's *prima facie* case also shows that Defendant's proffered non-discriminatory reason could have been pretextual. Therefore, it found that a reasonable jury could conclude that sex discrimination was *a* motivating factor in the decision to deny Plaintiff tenure because of the disproportionate number of introductory courses assigned to women in the Math Department. Id. at 914-15.

Grant v. Cornell University, 87 F.Supp.2d 153 (N.D.N.Y. 2000)

Plaintiff Keith Grant, an African American was the first person of color to ever be hired into a tenure-track position within the Theater Arts Department of the College of Arts and Sciences at Cornell University. Grant was hired on July 1, 1989 as an assistant professor. This decision to hire was approved by the Senior Faculty of the Department and the Department Chair. The position was for three years and was not tenured. However, the position came with the option for Cornell to renew Grant's appointment for another three years. Near the end of his second three-year period, Grant was to be again reviewed for tenure and if denied, he would be given a final one-year term of employment. Near the end of his first three-year term, Cornell decided to reappoint Grant for the second term. A March 2, 1992 letter from the Department Chair (Levitt) reviewed Grant's teaching, artistic work, service and collegiality. The letter contained many positive comments but also contained some negative comments. This letter explicitly laid out the criteria the plaintiff needed to achieve to qualify for tenure. The criteria stated in the letter read:

> [I]n three years time you will be held to a standard of achieving some level of national recognition. This level of national recognition is a necessary condition for all candidates to be promoted to Associate Professor with indefinite tenure. It is, therefore, incumbent upon you to immediately choose and develop an area of expertise: directing, acting, or teaching. In one of these areas you must achieve significant credential in the next three years…We want to emphasize at this juncture that a national reputation is a necessary condition for promotion." Cornell, 87 F.Supp.2d at 156-157.

To assist the plaintiff in the tenure process, the Senior Faculty assigned Professor David Feldshuh to serve as his mentor. In this role, Feldshuh provided advice and counsel and served as a conduit between plaintiff and the Senior Faculty, who would ultimately vote on whether to recommend plaintiff's tenure. Feldshuh served as plaintiff's mentor from 1992-1995 where he met with plaintiff and provided extensive comments and evaluation. In one such meeting in May 1993, Feldshuh sent a letter afterwards "memorializing" the comments he made to plaintiff. In this letter, plaintiff was criticized for grade inflation, poor communication with students and faculty and poor artistic achievement. Feldshuh believed at this time that plaintiff needed significant improvement in all areas required for tenure. Id. at 157.

Between 1994-95, plaintiff's problems continued and he received criticism in all areas, which were being taken into account for tenure purposes. Though plaintiff received accolades from some individuals, the Senior Faculty gave greater weight to the criticisms, some of which derived from their own personal observations. Id.

Near the end of his second term, in 1995, plaintiff was reviewed again from tenure and as a result of plaintiff's failure to achieve the required achievements, the Senior Faculty unanimously recommended denial of tenure. Seven members of the Senior Faculty voted: five were the same members who had initially recommended plaintiff's hiring in 1989 and his reappointment in 1992. Plaintiff appealed this decision – unsuccessfully. Then Plaintiff appealed to Dean of the College of Arts and Sciences, who convened an ad hoc committee to review the negative recommendation but this commission ultimately agreed to deny tenure after a thorough review of all of the evidence concluding that there was no compelling evidence that the Department of Theatre Arts intentionally acted in bad faith and agreed that plaintiff failed to meet the tenure requirements (i.e. national recognition, and issues with students). Id.

Plaintiff then appealed decision to the university appeals committee, comprised of five faculty members, none of whom were related to plaintiff's department. The committee conducted an intensive investigation and concluded that there was no racial discrimination when the theatre department recommended to deny plaintiff tenure and that the department had valid reasons.

After another appeal, plaintiff ultimately chose to resign rather than serve out the remainder of his last year on August 15, 1996. Plaintiff then commenced this action on July 30, 1997. Id.

The court commenced its analysis of the claim by noting:

> The Second Circuit has noted repeatedly that tenure decisions involve unique factors which set them apart from ordinary employment decisions, and federal courts should exercise caution in reviewing them. See Fisher v. Vassar College, 70 F.3d 1420, 1434–35 (2d Cir.1995), reh'g en banc, 114 F.3d 1332 (2d Cir.1997) [Other citations omitted] "Because tenure decisions involve a

> myriad of considerations and are made by numerous individuals and committees over a lengthy period of time, a plaintiff 'faces an uphill battle in [his] efforts to prove discrimination on the basis of race ...in the refusal to grant [him] tenure.' " [citations omitted].Thus, while tenure decisions are not immune from review, courts are cautious in second-guessing tenure decisions, as the "court does not sit as a super tenure-review committee." [citation omitted].

Id. at 157-58.

Further, the court ruled: "In order to show that he was qualified for tenure, plaintiff must demonstrate that "[s]ome significant portion of the departmental faculty, referents or other scholars in the particular field hold a favorable view on the question." Id. Moreover, "[c]onsiderably absent from the record is any proof that "some significant portion" of the Department viewed plaintiff as qualified for tenure. It is undisputed that none of the Departmental faculty believed plaintiff qualified for tenure; indeed, the faculty unanimously voted to recommend denial of plaintiff's tenure, specifically finding that he was not qualified. On reconsideration, the faculty unanimously voted to recommend denial of tenure for a second time." Id.

The court also concluded that Grant came forward with "very little evidence" that suggested that his tenure denial occurred under any circumstances that gave rise to an inference of discrimination. Id. at 159. The evidence that plaintiff supplied to the court to prove an atmosphere of racial discrimination included: anecdotal stories about poor treatment he received within the Department, three unsworn letters from other African Americans who anecdotally complained of racial tensions within the Department. Id. at 160. The court ruled that this insufficient evidence coupled with plaintiff's ability to in fact demonstrate he was qualified for tenure in the first place would not lead a reasonable jury to find that he was denied tenure to due his race. Id.